



Fixing Fights

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

It is not uncommon for us to field calls from clients querying what to do when a physical altercation occurs between employees, and particularly when one person appears to have been the protagonist. A recent decision of the Employment Court, **Smith v. Ministry for Primary Industries (MPI)**, has dealt with a matter arising from an incident which occurred outside work hours at a bar in Wellington following a farewell function at MPI's office.

The facts before the Court involved two staff members who had attended a farewell function at MPI's Petone office, one of the staff who was leaving was Katy Martley. Mr Smith, the employee who alleged he was unjustifiably dismissed, had travelled from New Plymouth to attend the function at MPI's office, which was incident free. After Mr Smith had left the function he was telephoned by Ms Martley to join her and some colleagues, who were travelling into Wellington to go to a bar in Courtney Place.

At the bar Mr Smith and Ms Martley had a conversation during which Ms Martley became upset, which she attributed to the emotions of leaving MPI. Ms Martley went to the ladies toilet. Mr X (another MPI employee) had witnessed the conversation between Mr Smith and Ms Martley and concluded they had had a disagreement and so he went to the toilets to check if Ms Martley was okay. Mr Smith and Mr X "encountered each other" as they were approaching the toilets.

Mr Smith told the investigation he was grabbed by Mr X and pushed into a wall. He responded by punching Mr X. Effectively, his statement was that he was defending himself. Mr X told the investigation he was attacked by Mr Smith without provocation and repeatedly punched. Mr Smith denied initiating the encounter but admitted punching Mr X about a dozen times. This part of the incident happened in an area of the bar separated by a wall from the table where the MPI staff had gathered. There were no witnesses to the beginning of this exchange other than Mr Smith and Mr X.

Craig Wallace, one of the MPI employees at the bar, attempted to intervene and was struck by Mr Smith, receiving a black eye. The fight ended and Mr Smith left that part of the bar. Several minutes later, Mr Smith returned. Mr X saw him returning and without any preamble Mr X punched Mr Smith in the head knocking him to the ground. Mr X then left and went to the toilets. Eventually Mr Smith and Mr X left the bar separately.

Mr Wallace's black eye was noticed and he was asked what had happened. Separately MPI's Investigations Manager received a complaint from Mr X alleging he had been assaulted by Mr Smith. Mr Smith complained about Mr X as well.

As a result MPI initiated a formal investigation. The allegation about Mr Smith to be investigated was that, without provocation, he repeatedly punched and struck Mr X while they were in the bar. During the investigation Mr Smith stated that in August 2015 he had been diagnosed as suffering from depression and was treating his illness with medication, the dosage of which was increased on 14 September 2015, three days after the incident in the bar. Mr Smith stated the reason for the incident was a combination of being depressed through work and drinking alcohol while taking medication, however he stated "the responsibility remains mine and I accept that fully".

MINIMUM WAGE INCREASE

From 1 April 2018 the new adult minimum wage (before tax) that applies to employees aged 16 or over will be \$16.50 an hour

The new minimum wage rates that apply to new entrants and employees on the training minimum wage (before tax) will increase to \$13.20 an hour.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson,** or **Peter Zwart.**

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The investigation concluded the following:

- “(a) both Mr Smith and Mr X’s actions amounted to physical violence against each other and constituted actions which were detrimental to the safety and physical health of MPI staff;*
- (b) both Mr Smith and Mr X’s actions breached MPI’s code of conduct;*
- (c) not altered by potential mitigating factors; and*
- (d) the actions of both men amounted to serious misconduct but the protagonist was Mr Smith.*

[24] Mr Blake was not able to decide if Mr X had initiated the first altercation as had been claimed by Mr Smith (which would, if accepted, have provided an explanation of having punched Mr X in self-defence). Mr Blake did conclude that the injuries sustained by Mr X were the result of excessive force as shown by the injuries he sustained.

[25] While Mr Blake did not conclude how the incident started he had sufficient information to allow him to find that it was more likely than not Mr Smith hit Mr X without provocation. Mr Blake concluded Mr X had his head down, covering up to protect himself from the blows he described as “numerous hay-maker type punches”. He found the assault was serious and deliberate.”

The investigation “*came close to accepting that Mr X had acted in self-defence because of the ferocity and unprovoked nature of what had occurred however the investigation determined that both Mr Smith and Mr X’s conduct amounted to serious misconduct”.*

At the conclusion of a disciplinary meeting, which lasted approximately six hours, MPI dismissed Mr Smith. In a separate disciplinary meeting MPI imposed a written warning, with a six month duration, on Mr X.

Disparity of Treatment

One of the significant claims made by Mr Smith was that there had been disparity of treatment between himself and Mr X given that they had both engaged in serious misconduct. In pursuing this claim Mr Smith was not critical of the investigation report however relied upon the inconsistent treatment handed out by MPI to Mr Smith and Mr X.

The Court referred to the description of disparity of treatment in the Court of Appeal decision **IRD v. Buchanan**:

- (a) Is there disparity of treatment?
- (b) If so, is there an adequate explanation for the disparity?
- (c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

The Court noted that a problem for Mr Smith, in pursuing claims of disparity of treatment, was that he had accepted the investigation report and in “*doing so he accepted the conclusion that he was the protagonist and inflicted serious injuries while engaging in serious misconduct”.*

In respect to MPI’s decision to impose different penalties upon Mr Smith and Mr X, despite the investigation concluding that both men’s conduct had constituted serious misconduct, the Court noted:

“[60] A comparison between Mr Smith and Mr X does not exist beyond a shared label of serious misconduct. The report concluded Mr Smith was the protagonist and acted without provocation. That was an important distinction and it was enough to justify Ms Rowe’s preliminary opinions about disciplinary action she proposed to take.

[61] Furthermore, it was inevitable a discussion with Mr X about the outcome of her decision-making for him would encompass his claim of self-defence because, if accepted, it would be relevant. From that discussion Ms Rowe was able to make a decision and she accepted it was more likely than not Mr X acted in self-defence. That is an adequate explanation for treating Mr Smith and Mr X differently. . . “

Mr Smith also claimed that there had been disparity of treatment involving an earlier incident of behaviour involving Mr Smith “*throwing sausages and swinging a chair*” which did not end in any disciplinary action. The Court clearly restated the principle that “*an employer’s previous leniency does not mean it is bound to treat subsequent breaches leniently as well”.*

The Court, in referring to the “*third limb*” in the **Buchanan** case (set out above) determined:

“[74] An employer in MPI’s position, faced with a thorough inquiry and an admitted act of serious misconduct, must be entitled to dismiss the employee concerned. Mr Smith cannot have been in any doubt that, once it was established he had punched a colleague about a dozen times inflicting serious injuries, he was at risk of being dismissed.

[75] Even if MPI had been unable to explain the disparity it would still have been able to justifiably dismiss Mr Smith for serious misconduct.”

The Court’s determination on the issue of disparity of treatment is a useful one for employers to be mindful of when faced with assertions by employees in a disciplinary setting that they are being subject to disparity of treatment. Of particular note is the Court’s clear determination that previous acts of leniency do not dictate that employers must continue to act in that fashion.